In the Supreme Court of the United States.

Columbus Winchester Motes, alias Chess Motes, et al.
Plaintiff in Error.

VS.

The United States,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Statement of the Case.

The Plainiffs in error, Columbus Winchester Motes, alias Chess Motes, Walter W. Motes, John Littlejohn, Mark Grant Blankenship, alias Dodge Blankenship, Jasper Robinson and William Robert Taylor (who is not a plaintiff in error), were indicted at the September term, 1897, of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, at Birmingham, Alabama, under Sections 5508 and 5509 of the Revised Statutes of the United States, which read as follows viz.:

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of

another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter inelligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States.

Sec. 5509. If in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor, by the laws of the State in which the offense is committed."

Their trial was begun at Birmingham, Alabama, on the 20th day of September,1898.

W. A. Thompson, alias Dock Thompson, was found dead on the highway, about a mile and a half from his home on the 16th day of March, 1898, and his death was produced from gunshot wounds. The place where his body was found was distant from the homes of the plaintiffs in error respectively as follows, viz.: about three miles east of where Columbus W. Motes, Walter W. Motes and Jasper Robinson resided, and about three miles north of where John Littlejohn resided, and eight miles north of where the other plaintiff in error—Blankenship—resided; and the evidence was, that deceased had been dead about forty-eight hours when his body was discovered. The deceased had reported and informed R. A. Moseley, Jr., a United States Commissioner for said Division and District, that the plaintiffs in error, excepting John Littlejohn, had been guilty of illicit distilling in violaton of the revenue laws of the United States, and upon such charge each of the plaintiffs in error, except John Littlejohn, had been arrested, bound over and indicted in the United States Court at Birmingham, Ala., and the said cases were pending in the United States Court at Birmingham at the time deceased came to his death, and deceased was on record as a witness to be called against the defendants (plaintiffs here in error). The deceased had also reported and informed upon others in his neighborhood.

The theory of the prosecution was that the plaintiffs in error had killed the deceased because he exercised a right of a citizen of the United States in informing upon and causing the arrest of the plaintiffs in error.

The plaintiffs in error (defendants below) had been arrested and brought before H. A. Wilson, a Commissioner of the United States, for a preliminary examination, on the present charge. The defendants, Columbus W. Motes, William Robert Taylor, John Littlejohn, and M. G. alias Dodge Blankenship, were put upon a preliminary trial before said United States Commissioner, H. A. Wilson, in the month of August, 1898, and were represented by counsel, viz., Lee Cowart, Esq., of Birmingham, Ala.

During the progress of the trial of the last named four defendants, one of said defendants, viz., William Robert Taylor, made a confession in open court, which was reduced to writing by the Commissioner, and in this deposition this defendant implicated the remaining three defendants, Columbus W. Motes, John Littlejohn and M. G. alias Dodge Blankenship. He went further, and implicated Walter W. Motes and Jasper Robinson, who were arrested soon afterwards, and on the same day, and brought before the same Commissioner, H. A. Wilson, while the trial of the other four was in progress.

It does not appear at what hour nor how far the trial had progressed, when Walter W. Motes and Jasper Robinson were brought into Court. It does not appear that the two last named, Motes and Robinson, were put upon trial, or if the Commissioner so intended that they were even notified of the fact, nor that they had counsel to assist them on said preliminary trial, nor that they cross-examined the defendant, William Robert Taylor, nor that they were present in court when he testified or heard all of his testimony implicating them in the murder of W. A. Thompson, nor does it appear that they had a reasonable time to procure counsel, or were asked if they were ready for trial. (See Record, page 17 to 22.)

It does appear from the testimony of B .W. Bell, "who worked these cases up," that the defendants, Walter W. Motes and Jasper Robinson, were not arrested until the trial of the other four defendants had been in progress before Commissioner Wilson for two days. (See Record, page 17.) It further appears, from the testimony of the Commissioner, H. A. Wilson, given on the final trial, that no separate trial of these last (two) named defendants was had, and "all of these were committed

to jail without bail." (See Record, page 18 and 19.)

The defendant, William Robert Taylor, was taken from the Jefferson county jail two days before the final trial of his co-defendants, by the said B. W. Bell, who "worked these cases up," and turned over to one Ed. May, whose official station is not known, and who was instructed to allow prisoner to sleep at the hotel with his family. (See Record, page 17.) And the prisoner had the freedom of the courthouse and corridors (Record, page 17), and failed to answer when called as a witness, and in his stead his former deposition given upon the preliminary trial of some of these defendants in August preceding, was allowed to be read to the jury against objection of all the defendants, because it was not shown that the absent defendant-witness Taylor was either dead, ill, insane or beyond the jurisdiction of the Court. The defendants, Walter W. Motes and Jasper Robinson, objected severally to the reading of said deposition in evidence upon the further and additional ground that it was not competent testimony as against them, they never having been put upon trial, or notice, in the preliminary trial, nor cross-examined the witness, Taylor, nor allowed a reasonable time to do so, nor to procure counsel, nor the privilege of being present and hearing the witness testify, and seeing his countenance and manner while testifying, nor having the privilege of being confronted with the witness upon any trial.

The Court allowed this deposition to be read as evidence against all of the defendants. The Government introduced evidence tending to prove against the defendants the commission of other and distinct crimes (not illustrating the crime charged) at other times and places, viz.: Running and having illicit distilleries several years prior to any of these prosecutions, and in Talladega county, Alabama, which was objected to by defendants.

A threat made by Columbus Motes a few days prior to the killing of Thompson that he would kill Thompson, was testified to by the wife of William Robert Taylor, the defendant who had made the confessorial deposition (who was not on trial) and against his co-defendants, and objected to by them.

The Government then introduced Dr. J. E. Pearson as an expert surgeon and physician, and some animal substance scraped from a shoe,

alleged to have been worn by the defendant, Columbus W. Motes, and the expert pronounced this substance human blood.

Thompson was killed in March, 1898, and this trial was had on September 20, 1898, six months thereafter. The jury were permitted to examine it through microscope, which was objected to by defendants.

The defendants each testified for themselves, and each denied his guilt, except Columbus W. Motes, who confessed his own guilt, implicated William Robert Taylor as his companion in the crime, and wholly exculpated and exhonorated each of the others, his co-defendants.

While each of the defendants were upon the stand in his own behalf, the Court allowed the District Attorney to ask each defendant, and required the defendants to answer, whether or not he had been guilty of illicit distilling previous to the time said Thompson was killed, and the defendants objected to this because it tended to prejudice the jury against them by showing the commission of another offense, and did not tend to throw any light upon the question of their guilt vel non, which objection was overruled. The court refused fourteen (14) written charges asked on behalf of the defendants, which is assigned as error.

The trial resulted in a verdict of guilty as to each defendant. The defendants moved in arrest of judgment, which motion was overruled, and they were each sentenced to life imprisonment, and sentence suspended pending the prosecution of this writ of error.

Assignment of Error.

Plaintiffs have assigned the following errors upon which they will rely:

1. That the United States Circuit Court for the Southern Division or theNorthern District of Alabama erred in overruling the request of the plaintiffs to have the right to challenge eleven jurors each peremptorily on their trial in the said Circuit Court of the United States.

2. That the said Court erred in allowing the United States to challenge five jurors peremptorily.

3. The Court erred in allowing the Government to introduce evidence that the Deputy United States Marshals destroyed a distillery near the residence of the plaintiff in error, Blankenship.

4. The Court erred in allowing the Government to prove by Mrs. W. A. Thompson, against the objection of counsel for plaintiffs in error, that the said defendants, Walter W. Motes, Columbus W. Motes, William Robert Taylor, and Jasper Robinson, operated an illicit distillery in Talladega county, Alabama, in the fall of 1895.

5. The said Court erred in permitting the District Attorney, for the United States, to exhibit said still to the jury, and to set said still and stilling apparatus up in the presence of the jury.

6. The said Court erred in allowing the said witness to examine said still and say it was the same still that she had seen the plaintiffs in error, aforesaid, operating in Talladega county, Alabama, in the fall of 1895.

7. The said Court erred in allowing the still, cap and worm, to remain in the presence of the jury throughout the trial of the case.

8. The Court erred in permitting the witness, B. W. Bell, to testify that the still and apparatus was found near the dwelling house of Walter W. Motes, one of the plaintiffs in error.

9. The Court erred in permitting the deposition of William Robert Taylor to be read in evidence against Columbus W. Motes, Dodge Blankenship, John Littlejohn, Walter W. Motes and Jasper Robinson.

10. The Court erred in allowing the deposition of William Robert Taylor, given upon the trial of the other plaintiffs in error, Columbus W. Motes, Dodge Blankenship and John Littlejohn, to be read in evidence against the other plaintiffs in error, Walter W. Motes and Jasper Robinson.

11. The Court erred in allowing the witness, Mrs. Mary Taylor, wife of William Robert Taylor, whose deposition and confession of guilt had been made, to testify against his alleged accomplices, the other plaintiffs in error, that she had heard Columbus W. Motes agree with her said husband to kill W. A. Thompson the next day to prevent him from being a witness against them.

12. The said Court erred in allowing the jury to look through the microscope at the alleged blood and brains.

13. The Court erred in allowing the District Attorney to put the question to the plaintiffs in error, while they were testifying, each for himself as to whether or not they had been guilty of illicit distilling previous

to the time said Thompson was killed.

14. The Court erred in overruling the motion of plaintiffs in error in arrest of the judgment of the court.

15. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (1) "If the jury believe the evidence, they will find the defendants not guilty."

16. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (2) "If the jury believe the evidence they will find the defendant, Walter Motes, not guilty."

17. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error: (3) "If the jury believe the evidence, they will find the defendant Jasper Robinson, not guilty."

18. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (4) "A probability of the innocence of the defendants, Dodge Blankenship, John Littlejohn, Walter Motes and Jasper Robinson, is a just foundation for a reasonable doubt of their guilt, and is therefore sufficient to entitle them to a verdict of not guilty."

19. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (5) "The court charges the jury that before a conspiracy can be established and made out, they must be satisfied beyond a reasonable doubt that there was an agreement by and between them to commit the offense charged in the indictment, and that though they may find that this agreement was made by some of the defendants, yet if they were not present and neither aided or abetted in the consummation of the offense, they must find the defendants not guilty."

20. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (6) "To be a citizen of the United States means that a person has been born or naturalized in the United States; mere proof of the fact that a person has had his residence within the United States is not sufficient to make him a citizen of the United States, within the meaning of the law."

21. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (7) "A person may

reside in Talladega County, Alabama, or in any other place in the United States, and not be a citizen of the United States within the meaning of the law, and before the jury can convict the defendants in this case, they must believe, from the evidence in the case, beyond a reasonable doubt and to a moral certainty, that W. A. Thompson was not only a resident of Talladega County, Alabama, but that he was also a citizen of the United States, entitled to all of the civil and political rights to which a citizen may be entitled under the Constitution and laws of the United States.

22. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (8) "The court charges the jury that if the weaker and less satisfactory evidence is relied on in support of a fact, when it is apparent to the Court and jury that proof of a more direct and explicit character was within the power of the Government, the same caution which rejects the secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory, and it may well be presumed that if the more perfect exposition had been given, it would have laid open the deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

23. The Court erred in refusing to give to the jury the following instruction requested by plaintiffs in error, viz.: (9) "That if the jury believe from the evidence that Robert Taylor and Columbus Motes were the only defendants that did conspire to kill Thompson on the account of exercising the right of a citizen of the United States in becoming a witness in the Court of the United States, then they will find Walter Motes, Jasper Robinson, John Littlejohn and Mark (Dodge?) Blankenship not guilty.

24. The Court erred in refusing to give to the jury the following instruction, viz.: (10) "That although the jury may believe, from the evidence, that W. A. Thompson came to his death at the hands of the defendants, this is not sufficient to convict the defendants as charged. That they must further find from the evidence that the defendants, each of them, did conspire in manner and form as charged in the indictment; and if they fail to find that there was a conspiracy between the defend-

ants as charged in the indictment, they must find the defendants not guilty."

25. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (11) "The Court charges the jury that the testimony of William Robert Taylor, taken before the Commissioner in the preliminary trial, cannot be considered by them as evidence against the defendants not on trial at the time at which the testimony was taken."

26. The Court erred in refusing to give to the jury the following instruction, viz.: (12) "If the jury find from the evidence that W. A. Thompson has been convicted of an offense punishable by imprisonment in the penitentiary, and sentenced to serve a term of eighteen months in the penitentiray, they will find all of the defendants not guilty."

27. The Court erred in refusing to give to the jury the following instruction requested by plaintiffs in error, viz.: (13) "If the jury find from the evidence that W. A. Thompson has been convicted of an offense punishable by imprisonment in the penitentiary, they will find all of the defendants not guilty.

28. The Court erred in refusing to give to the jury the following instruction requested by the plaintiffs in error, viz.: (14) "If the jury believe from the evidence that W. A. Thompson was killed because he was a witness in the District Court of the United States, and they should find further that these defendants, or either of them, are guilty of the murder of Thompson, it is then the duty of the jury to find such defendant or defendants guilty as charged in the seventh and last count in the indictment.

29. The sentence is illegal.

Argument and Authorities.

First Error. The plaintiffs in error were each entitled to challenge eleven (11) jurors peremptorily.

Criminal Code of Ala., Sec. 5015.

Second Error. The Government was entitled to but four peremptory challenges if the offense charged was not capital.

Criminal Code of Ala., Sec. 5015.

The conspiracy charged in the indictment in the first counts thereof is not a capital offense.

U. S. Rev. Statutes, Sec. 5508.

The seventh and last count of the indictment charges the offense of murder while pursuing a conspiracy and the statute does not in terms prescribe a penalty, but refers that to the Alabama law.

U. S. Rev. Statutes, Sec. 5509.

In Alabama murder is a capital offense if in the first degree.

Criminal Code of Ala., Sec. 4858.

Under this count the Government would be entitled to fourteen (14) peremptory challenges, and the plaintiffs in error eleven (11) each.

Under the counts not charging a capital offense, the plaintiffs in error were entitled to only eight peremptory challenges.

Criminal Code of Ala., Section 5015.

There was a misjoinder of counts in the indictment, which would render it bad at common law. The criminal code of Alabama permits a joinder in one count "when the offenses are of the same character, and subject to the same punishment."

Criminal Code Ala., Section 4913.

It is uncertain from this indictment how many peremptory challenges the Government and the plaintiffs in error were entitled to. It is believed that the subject of challenges is here governed by the Alabama Statute.

The 3d, 4th, 5th, 6th, 7th, 8th and 13th assignments of error should be considered together. The government should not have been allowed to

prejudice the jury unnecessarily by offering evidence of other offenses committed by plaintiffs in error at distant and different times, nor exhibit the alleged instrumentality of said offense, to-wit: the still and accompanying apparatus, nor permitted the same to be offered in evidence, nor to remain in evidence. "It is a dangerous species of evidence," says Mr. Rice, in his work in criminal evidence, "not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime, by proof that he is guilty of another. For this reason it is essential to the rights of the accused that when such evidence is admitted it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose, for which it is competent."

Rice, Crim. Ev., p. 218, Sec. 157.
Roscoe, Crim Ev., 90, 94.
Rex v. Ball, Russ & R., 132.
Com v. Eastman, 1 Cush., 189, 48 Am., Dec., 596.

"When such evidence is admitted," etc., says the text of Mr. Rice.

When ought evidence of other offenses be allowed against a defendant? It is believed to be only when it serves to illustrate and throw light on the offense charged, and is indispensable. In the case at bar it was permissable, perhaps, to show a motive on the part of plaintiffs in error, which might cause them to kill the deceased, and pursuant to this end the government was permitted to show that the deceased had informed on the plaintiffs in error, charging them with illicit distilling, and was a witness against them in the prosecution pending at the time of W. A. Thompson's death.

That was surely sufficient, and the enquiry should have been stopped there. It was error to go beyond this and offer evidence of the particular offense so committed and then dramatize it, as it were, by using the courtroom as a stage and the jurors for an audience. This was bad practice—a travesty upon judicial proceedings.

9th, 10th, 22nd, and 25th Assignments of Error. The deposition of Taylor given on a preliminary trial of some of these defendants should not have been read against any of the plaintiffs in error, because it was not shown that the witness who gave the deposition was either dead, ill, or insane, or beyond the jurisdiction of the court. No predicate had been laid. Special Officer B. W. Bell took the witness out of jail two days before court, and although under indictment for murder, he allowed him to sleep at the hotel with his family, and was free to go and come about the court-house; was seen in the corridors one hour before called as a witness. (See Bell's testimony, Record, p. 17.) Bell was an officer of the government who "worked this case up," to use the expressive vernacular of the witness. He obtained a confession from Taylor in the approved way, and Taylor implicated others. Bell says he promised Taylor nothing, but he in fact was guilty of a voluntary escape, and let Taylor walk away, knowing that he had this deposition now complained of. The deposition is subject to the infirmities raised in the 22d assignment of error, charge No. 8. The deposition was not competent evidence against any of the plaintiffs in error, because it was not shown that the witness, Taylor, was dead, sick or beyond the jurisdiction of the court. Charge No. 8 should have been given.

Brown v. Com., 73 Pa., 321; 13 Am. Rep., 740.
State v. Chambers, 43 La. Am., 1108.
Rice on Crim. Ev., Ch. 33, p. 379 et seq., authorities cited there.

The deposition was certainly not competent against Walter W. Motes and Jasper Robinson, for the reasons assigned to its incompetency generally, and against any of the plaintiffs in error, and for the additional reasons that these two, Walter W. Motes and Jasper Robinson, were arrested on the same day and brought before the same Commissioner on the same day, charged with the same offense with the other four (4) plaintiffs in error who were being tried by the Commissioner. It does not appear in all, or any of the evidence that these two, Walter W. Motes and Jasper Robinson, were ever put upon a preliminary trial and given an opportunity to cross-examine the witness, Taylor. They were never notified of

such fact, if they were being tried.

The Commissioner at the trial testified that their case was postponed. Again he says there was no separate trial of these two. (Record, pages 18 and 19.) It does not appear that they had counsel to assist them, or were heard in their own behalf.

Amd. Const U. S., Art. 6.
U. S. Rev. Statute, Sec. 1034.

It does not appear that Walter W. Motes and Jasper Robinson were continuously in court during the preliminary trial and heard all that Taylor said against them. It does not appear that they did have a reasonable length of time in which to employ counsel or prepare a defense. They were arrested in the midst of the preliminary trial and charged with murder. The law of human nature would warrant the presumption that they were confused, terrorized and unable to cross-examine a witness. They were not confronted with the witness against them.

The trial of the other four (4) had been in progress two (2) days when the last two (2) were arrested. They were not permitted to see the manner and circumstance of the witness; they being witnesses themselves, it was presumed they were under the rule.

The following eloquent exposition of the importance of this doctrine is here quoted from Mr. Rice: "This subject of depositions received in criminal cases is freighted with grave constitutional rights. The organic law has guaranteed a well recognized prerogative, the manifest justice of which it was the just pride of the civil law to have established. That law provides that no person shall be convicted of a heinous criminal offense—pilloried at the bar of opinion, deprived of his fair name and reputation, despoiled of his property, outraged in every sensibility by any law which admits in evidence the irresponsible, ex parte allegation of his most virulent traducers under the guise of a deposition."

Rice on Evidence, Vol. 3, p. 285.

And the exceptionally able dissenting opinion of Mr. Justice Brady there eulogized is pressed upon the attention of the court.

11th Error. The evidence must show a conspiracy to have existed before the declarations of a co-conspirator can be received against the confederates.

Rice on Crim. Ev., page 903.
Roscoe's Crim. Ev., 5 Am. Ed., p. 414.

Mrs. Mary Taylor and her husband were one in law. What he could not do, she could not. Her testimony as against other defendants than Columbus W. Motes was illegal. If she heard Columbus Motes conspire with her husband to kill Thompson, the testimony, if legal at all, should have been limited as to Columbus Motes. Aside from the idea of a conspiracy, it is clear that the declarations or threats of the one defendant are not competent evidence against other defendants.

Besides, she was the wife of a conspirator who had pleaded guilty. Could she testify against her husband? The court should have excluded her evidence, or, admitting it, limited it to the persons conspiring or threatening to kill Thompson. There was no proof of a conspiracy as to other defendants, except the objectionable and illegal deposition of Taylor above mentioned.

12th Error. The practice has undoubtedly obtained of receiving expert and opinion evidence to identify blood in cases of homicide as human blood. Dr. Wharton, with rare felicity, touches the very pith and marrow of this entire subject in Sec. 777 of his Criminal Evidence:

"Scarcely a case arises," says this learned author, "when this issue is material, in which experts have not appeared ready to identify dried blood as human, and by this process supply a link on which a conviction of a capital offense may be made to rest.

It is perhaps a minor matter that in this way immense expenses are heaped, not only on the State, but on the accused. Experts are brought from a distance by the State at great cost, protracted experiments are made by them, afterwards to be detailed to the jury, and testimony is added which the defendant must meet at the peril of his life. Controvert it, he readily may, if he can procure the means, for the great weight of authority, as will presently be seen, is that such identification cannot be accurately determined. But to procure this testimony may be impossible for him, unless the prosecution assume the expense, which it often

is either unwilling or unable to do. This amounts to a perversion of justice. But this is not the chief objection. Supposing that experts are obtained so as to fully exhibit to the jury both sides of this vexed question, and the case goes to the jury on their testimony, what then? Is there not danger that the jury may regard the question as one determined, not by ascertainable physical laws, but by their own discretion, or on the authority of particular experts. It would seem, in view of these dangers and in view of the more recent explorations of scientists who have viewed the question, not as advocates retained by a particular party, but as dispassionate investigators, that the time has now arrived in which it is the duty of courts to advise jurors in all cases in which it is proposed, to rest a conviction on the identification of certain blood stains as human, that as a matter of fact no such identification can be made out beyond a reasonable doubt. That stains look like blood may be proved by expert and non-expert; that they are dried human blood can be satisfactorily proved by no one."

That the jury may regard the question as one determined by their own discretion and not by natural laws is one of the grounds upon which Dr. Wharton bases his objection, and yet in the case at bar the jury were practically invited to look through the microscope, which they did, and of course draw conclusions of their own, and this was assigned as error. (See Record, pages 24 and 25.)

Mr. Rogers, in his well-known work on Expert Testimony, page 141, says: "When blood is dried upon clothing and it is necessary to extract the corpuscles by means of a liquid of a different nature from the semin, we cannot rely on slight fractional differences, since we cannot be sure that corpuscles, after having once dried, will ever acquire, in a foreign liquid, the exact size which they had in service. Medical evidence must therefore be based on mere speculation. * * *

"There are no certain methods of distinguishing microscopically or chemically the blood of a human being from that of an animal when it has once dried on an article of clothing."

14th Error. There are no crimes against the United States, except those created by act of Congress, Section 5508 of the Revised Statutes of the United States, creates and defines a crime based upon the con-

stitutional right of the Congress to prevent and punish conspiracies..

The Constitution of Alabama declares "that no person shall be accused, or arrested, or detained except in cases ascertained by law, and according to the forms which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied . (Art. I, Sec. 8.) This is doubtless the law of all English-speaking countries. .

Section 5509 of the Revised Statutes of the United States, provides:

"Sec. 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed."

If, while violating one law a "felony or misdemeanor is committed," says the statute, and the question is whether the words "felony or misdemeanor" mean such under the laws of the United States or State, when the words recur they refer expressly to State law in fixing the punishment. Congress cannot create a crime against the United States by using the words "felony or misdemeanor" under State law. Therefore the interpretation must be, that the words "felony or misdemeanor" refer to such crimes as are fixed by federal law, and as murder per se, is not within the United States law, it cannot be indirectly brought within them by being tacked on to a charge of conspiracy. If it be that the words "felony or misdemeanor" mean such under State law, it seems clear that Congress is without the power to create a crime against the United States by mere reference to State laws already existing. Granting that this could be done, still the Congress should make a substantive crime, defining it. It is urged that Section 5509 is unconstitutional and void for uncertainty. The defendants were convicted of murder, an impossible crime under this Section 5509. It may be that the United States can assume jurisdiction over the crime of murder when committed pursuant to a conspiracy, but must define each crime, and if so, then of all the crimes in the catalogue. If this can be done, it is here urged that it has not been done under Section 5509. No substantive crime is thereby created or defined by law, and such would be necessary

in an act of Congress.

15th, 16th and 17th Errors. The counts in the indictment are for conspiracy to deprive a citizen, etc., and for a murder alleged to have been committed pursuant to a conspiracy. There was no proof of conspiracy among all of the plaintiffs in error, and there was no legal proof of a conspiracy among some of the plaintiffs in error. The ex parte affidavit of Taylor on the preliminary trial was against all of the plaintiffs in error, and if competent, would prove a conspiracy among all of the plaintiffs in error; but if rejected as incompetent, the only other evidence of a conspiracy included Columbus W. Motes and William Robert Taylor, and this was shown only by Mrs. Mary Taylor, wife of William Robert Taylor, heretofore argued as incompetent as testimony against her husband and his alleged co-conspirator. If this also be rejected, the charge directing a verdict for all of the plaintiffs in error should have been given, or for some of them named in charges, to-wit: 16 and 17.

18th Error. A probability of the innocence of the plaintiffs in error is the equivalent of the proposition that there were more chances that they were innocent than that they were guilty, and this ascertained from the evidence would be a proper foundation for a reasonable doubt.

Cohen v. State, 50 Ala., 108.

Bain v. State, 74 Ala., 38.

Winslow v. State, 76 Ala., 42.

19th Error. The charge there refused is sumbitted without comm.....

20th, 21st and 26th Errors. The charge refused defined for the jury who was a citizen of the United States. Ordinarily in civil matters a presumption of citizenship would arise from proof of mere residence, but in a penal statute, when the citizenship of the person injured is of the essence of the crime charged, it should be proven as laid in the indictment. It was of the very essence of the crime created by Section 5508 of the Revised Statutes. At common law time was a material ingredient of an offense charged in an indictment, and it must have been proved as stated. The statute in Alabama obviates this by declaring

that the time may be alleged generally, as "before the finding of the indictment unless time is a material ingredient of the offense."

Crim. Code of Ala., Sec. 4901.

The burden of proof was on the Government to prove every material allegation of the indictment. Citizenship should have been proved. The only evidence was, that deceased was in the United States, in Alabama.

22nd Error. This charge was discussed with errors Nos. 9, 10, 22 and 25.

23rd Error. The charge was the equivalent of the proposition, that if Walter W. Motes, Jasper Robinson, John Littlejohn and Dodge Blankenship, did not conspire to deprive W. A. Thompson of a right, as a citizen, and did not conspire to kill him pursuant thereto, that they were not guilty. Further, that if Columbus W. Motes and Taylor did so conspire, they would alone be guilty. This charge was supported by the testimony of Mary Taylor and Columbus W. Motes, and should have been given.

24th Error. Of course the charge must have been proven as laid, and the United States law did not include bare murder dissociated from a conspiracy, as charged in the indictment. This charge should have been given.

25th Error. This was argued in connection with the 9th, 10th, 22nd and 25th assignments of error relating to the several phases in which the ex parte affidavit of Taylor arose in the case at bar.

26th and 27th Errors. This charge refers to citizenship, and the burden of proof. It only remains to be added that to be a citizen of the United States one must be a citizen of a State, with political and civil rights, and the converse is true. The Constitution of the United States provides "That citizens of each State shall be entitled to all of the privileges and immunities of citizens of the several States."

Constitution, Art. IV, Sec. 2.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside.

Amendments, Art. XIV., Sec. 1.

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.

Amendments Constitution, Art. XIV., Sec. 1.

All persons resident in this State, born in the United States or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared to be citizens of Alabama, possessing equal civil and political rights.

Constitution of Alabama, Art. I., Sec. 2.

In Alabama the Constitution provides that "Those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary, shall not be permitted to vote or hold office."

Constitution of Alabama, Art. VIII., Sec. 3.
Washington v. State, 75 Ala., 382.
Anderson v. State, 72 Ala., 187.
Gaudy v .State, 82 Ala., 61; 86 Ala., 20.

The proof showed that the deceased had been convicted of a crime prior to his death, or this alleged conspiracy, and sentenced to eighteen months in the penitentiary. (See Record, page 25.) It made no difference whether State or Federal Court. (See Code of Ala., Sec. 1557.)

Now the question is, since the deceased had lost his citizenship in the State of Alabama, by reason of his conviction, did his citizenship of the United States survive and exist at the time of his death or the formation of the alleged conspiracy? It would seem that he could not remain in the anomalous position of still being a citizen of the United States and not a citizen of the State of Alabama. The charges should have been given.

28th Error. This charge raises the question, whether or not, since a murder followed a conspiracy, the smaller crime was not merged in the greater. Was it not the duty of the jury to convict of murder if of anything?

29th Error. The sentence was illegal. See Record, page 37, for order pronouncing sentence of life imprisonment.) It is insisted that the Court had no authority to sentence the plaintiffs in error for a term longer than ten years. (See Sections 5508 and 5509 R. S.)

Plaintiffs in error respectfully submit that for the many errors of the court below, the cause should be reversed, and on account of the sentence of the Court being illegal, the plaintiffs in error should be discharged from custody.

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